ESTATE PLANNING OUTSIDE OF THE WILL: WORKING WITH NONPROBATE ASSETS

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I. Introduction

Understanding a client's full financial picture is vital in providing sound estate planning advice. An attorney's guidance to a client is incomplete without a discussion and review of assets that pass to beneficiaries outside of a person's will. Even though a client may execute a will giving his or her entire estate to a person or class of persons, that's often not the full story. The client will likely have assets that do not pass through the will. In fact, for some clients, the will might pass only a small fraction of a client's estate.

The proper use of nonprobate assets can have many advantages. Typically, nonprobate assets can be accessed quickly after a person dies, often with only an original death certificate. This can make liquid assets available quickly for certain final expenses of the decedent. Also, in the right circumstances, a person's entire estate could be designated to pass outside of the will, making a probate and its costs unnecessary.

On the other hand, the improper use of nonprobate assets can lead to problems. Establishing a joint account, merely for the convenience of giving another person the ability to pay bills, can lead to disagreements later when the full balance of the account passes to that person. Improper beneficiary designations of IRAs and other retirement plans can lead to negative tax consequences. Inconsistent designations, such as through the use of a community property agreement and joint tenancy, can lead to confusion and possible litigation upon the death of a client. Careful planning, review of all assets, and a thorough discussion with your clients about their wishes are essential.

II. Definition

Washington law defines nonprobate assets in RCW 11.02.005(10). Generally, the definition captures those assets that "pass on the person's death under a written instrument or arrangement other than the person's will." Often this is a contractual arrangement between the decedent and the financial institution whereby the financial institution agrees to transfer the asset to the person(s) the decedent designated. Other times, it can be a deed executed by the owner of a parcel of land where the owner makes a transfer on death designation. RCW 11.02.005(10) provides many examples of such instruments, most of which are discussed below. Importantly, the definition specifically excludes three common devices that practitioners assume would be included as nonprobate assets: life insurance policies, annuities, and employee benefit plans. This exclusion is important in protecting these assets from the claims of creditors and the expenses of an estate, which is discussed further below.

III. Real Property

A. <u>Joint Tenancy.</u> Joint tenancy is a form of ownership of real property whereby the ownership of the property immediately vests in the co-tenant(s) upon the death of one of the other owners. Among the most common methods for creating joint tenancy is through executing a deed to real property declaring the owners "joint tenants with right of survivorship." When joint tenancy is created in real property, the joint owners own an equal undivided interest. *Walsh v. Reynolds,* 183 Wn. App. 830, 854, 335 P.3d 984 (2014); *In re Estate of Politoff*, 36 Wn. App. 424, 427, 674 P.2d 687 (1984). This is different than when the owners are designated as "tenants in common." As tenants in common, the owners own an interest in the property proportionate to their contributions—both during their lives and after an owner dies. *Cummings v. Anderson*, 94 Wn.2d 135, 140, 614 P.2d 1283 (1980). When the ownership is held as tenants in common, a deceased owner's interest becomes a probate asset of that owner's estate.

B. <u>Transfer on Death Deeds.</u> In 2014, Washington adopted a new form of transferring real property called the "Transfer on Death Deed" (also known as a beneficiary deed). Ch. 64.80 RCW. Real property has always been the classic probate asset, usually triggering a probate if a person passes with such property in his or her name. With this newly recognized beneficiary deed, clients can convert this otherwise-probate asset into an asset that will pass outside of probate. This deed has the effect of conveying a parcel of real property to the beneficiary named in the deed at the moment the owner passes away. The deed has no effect on title during the owner's lifetime. The transfer on death deed is only effective with respect to the specific parcel of real property described in the deed.

To become effective, the beneficiary deed must meet the elements of a properly recorded deed, must state that the transfer to the beneficiary is to occur at the death of the owner (also known as "transferor"), and must be recorded before the death of the owner in the public records at the auditor's office of the county where the property is located. RCW 64.80.060. There is no need for a beneficiary to get notice of the deed, acknowledge the deed, or pay consideration for the deed. RCW 64.80.070.

During the transferor's life, the beneficiary deed can be revoked at any time without the consent or notice to the beneficiary. The document that revokes the deed must be signed by the transferor and acknowledged in the presence of a notary, must expressly revoke the transfer on

death deed, and must be recorded before the owner's death in the records of the county in which the real property is located. RCW 64.80.080.

A beneficiary who takes title to the real property after the death of the owner takes title subject to all conveyances, encumbrances, mortgage liens, or other interests to which the parcel of real property is subject at the moment of the transferor's death. In addition, the beneficiary's interest is subject to any claim for Medicaid recovery that is recorded within two years after the death of the owner. RCW 64.80.100(2).

After the death of the owner, the beneficiary should record a certified copy of the death certificate in the recording records of the county in which the property is located. The beneficiary will also be required to present a real estate excise tax affidavit when the death certificate is recorded. However, there is no liability for excise tax on a conveyance by transfer on death deed unless some contractual obligation of the owner to the beneficiary is satisfied by the deed. WAC 458-61A-202(6)(d).

If the beneficiary dies before the transferor, the beneficiary's interest lapses. RCW 64.80.100(1)(b). Therefore, the interest would not pass to the heirs of a predeceasing beneficiary. Instead, the interest in the property would pass under the transferor's will, or, if the transferor named other beneficiaries in the deed, to those other surviving beneficiaries. 64.80.100(1)(d).

Comparing Joint Tenancy and Transfer on Death Deeds

Before adding a joint tenant to a client's real property, a practitioner should consider whether a beneficiary deed would be more appropriate, noting the following differences:

- The creation of joint tenancy creates a present interest in all joint tenants. Beneficiary deeds do not.
- The creation of joint tenancy cannot be revoked without the consent of all joint tenants. Beneficiary deeds are freely revocable by the grantor.
- The creation of joint tenancy will usually be considered a gift, subject to federal gift tax rules and could be seen as a gift for Medicaid purposes. Beneficiary deeds are not considered gifts during the life of the owner.
- Judgments against a joint owner can attach to the real property, whereas judgments against a beneficiary listed in a beneficiary deed would not.
- Upon the death of the transferor, beneficiary deeds get a full step-up in the cost basis whereas a joint tenancy would not as to the gifted portion.

IV. Financial Accounts

A. **Joint Bank Accounts.** Clients commonly create joint bank accounts with other individuals. State law permits banks to establish accounts as joint *with* right of survivorship and joint *without* survivorship. RCW 30A.22.050(2)-(3). While the joint account holders are alive, they own a share of the account "in proportion to the net funds owned by each depositor on deposit in the account, unless the contract of deposit provides otherwise or there is clear and convincing evidence of a contrary intent at the time the account is created." RCW 30A.22.090(2). This means that prior to the death of one of the joint account holders, each depositor only owns the amount that he or she deposited into the account, absent some other evidence. *In re Krappes,* 121 Wn. App. 653, 660-63, 91 P.3d 96 (2004); *see also Estate of Lennon v. Lennon*, 108 Wn. App. 167, 183-84, 29 P.3d 1258 (2001) (holding that stepson had no right to write checks to himself and his two sisters as gifts from his and his stepmother's joint account when stepmother was depositor and when she had not authorized the gifts).

When an owner of a joint account *with* right of survivorship dies, however, the share of the deceased account holder vests in the surviving account holder(s). RCW 30A.22.100(3); *Doty v. Anderson,* 17 Wn. App. 464, 466-467, 563 P.2d 1307 (1977). Joint accounts *without* right of survivorship, however, are dealt with differently at death. With such accounts, the funds are always held proportionate to each account holder's contribution—during their lives and after one joint account holder dies. RCW 30A.22.090(2). Upon the death of one of the account holders, that person's funds would belong to his or her estate. RCW 30A.22.100(2).

Many times, bank accounts are established as joint accounts with right of survivorship with little thought as to the ramifications, namely, that the surviving owner will be entitled to all the funds in the account upon the death of the other owner. Parents and children often establish these accounts for convenience, and bank officers have been known to recommend such accounts as a way to avoid probate. While it is true that such accounts can avoid probate as to the funds in that account, it can be contrary to the primary account holder's intentions.

The case of *Taufen v. Estate of Kirpes,* 155 Wn. App. 598, 230 P.3d 199 (2010), presents a classic situation. In that case, a woman went to her bank to establish a joint account with her friend. Without telling her, the banker established a joint account *with* right of survivorship. She subsequently executed a will giving her friend her house, but giving other specific bequests and

the residue of her estate to various charities and other individuals. Due to certain unexpected deposits, the joint account grew significantly prior to the woman's death. After her death, the friend sued the estate, claiming that the funds were his. The law presumes that the funds held in a joint account belong to the joint owner after the death of the other account holder, but this presumption is rebuttable. *See* RCW 30A.22.100(3). And in this case, the estate successfully rebutted the presumption by presenting evidence that the decedent only asked the banker to set up a joint account and they never discussed whether it would be with right of survivorship.

B. **Pay on Death (POD) Bank Accounts.** Pay on death designations (also known as POD accounts) is a way to designate a certain person to receive the funds in a bank account upon the death of the account holder. *See* RCW 30A.22.050(5); RCW 30A.22.040(18). A POD designation has advantages and disadvantages over the traditional joint tenancy account. A POD designation brings more certainty regarding the account holder's wishes upon his or her death. However, the person who is designated on a POD account cannot access or help manage the account like a joint account holder could. Of course, this lack of control can be overcome by executing a power of attorney whereby a family member or friend can manage the account if the main account holder becomes incapacitated.

The forms many banks use to designate POD beneficiaries allow the account holder to name multiple beneficiaries and make the designation per stirpes or per capita. Attorneys may want to review these forms with their clients, given that many clients will not be familiar with these terms and clients and bank officials may be unaware of how these designations might effect their overall estate plan.

C. **Transfer on Death (TOD) Securities Account.** As with ordinary bank accounts, Washington State authorizes the use of transfer on death (TOD) and pay on death (POD) designations for securities and brokerage accounts. Ch. 21.35 RCW. These designations can also be changed at any time during the owner's life without the consent of the TOD designee(s). The forms used by brokerage firms typically allow for the naming of multiple beneficiaries and allow per stirpes or per capita designations.

D. **U.S. Savings Bonds.** U.S. Savings Bonds can be transferred outside of the probate process in a couple ways. First, if two people are named on the bond, the survivor becomes the owner of the bond. The survivor can redeem the bond for cash or can have the bond reissued in the survivor's name alone. The owner may also register the bond payable on death to another

person. RCW 11.04.240. The Treasury Direct website (www.treasurydirect.gov) is a good source for questions on naming beneficiaries and transferring U.S. Savings Bonds.

V. Assets that Act as Nonprobate Assets

Three common assets that act as nonprobate assets are actually exempted from the definition of nonprobate assets in RCW 11.02.005(10): employee benefit plans, life insurance policies, and annuities. The effect of this exemption is to take these assets out of the list of nonprobate assets that can be used to pay creditors and expenses of the estate under RCW 11.18.200. However, for all other purposes, they act like nonprobate assets – i.e., they pass to beneficiaries outside of the probate process if beneficiary designations are properly made.

A. <u>Employee Benefit Plans.</u> A 401k is a common type of employee benefit plan held by clients, which is governed by the Employee Retirement Income Security Act (ERISA). On the other hand, most Individual Retirement Accounts (IRAs) are not employee benefit plans under ERISA because the individual client rather than an employer creates the account. Yet, Washington law includes both 401ks and IRAs in its definition of employee benefit plans. *See* RCW 6.15.020(4) and 11.18.200(2)(*i*). Therefore, both (if beneficiaries are properly designated) are exempt from the claims of creditors and estate expenses. A full discussion of the complexity of retirement account designations is well beyond the scope of these materials. A good investment for practitioners who work in this area is Natalie Choate's *Life and Death Planning for Retirement Benefits*.

Practitioners should ensure that clients have named primary and secondary beneficiaries on 401ks, IRAs, and other retirement plans; and be wary of ever advising a client to name "the estate" as a beneficiary. When the proceeds of such accounts pass to the estate, beneficiaries are often unable to roll the account over into his or her own retirement account (as for spouses) or into an inherited account (for other beneficiaries). Instead, the account will be required to be distributed within five years following the participant's death. This five-year rule applies even if the decedent's will had a single beneficiary.

Estate planners should also remember that ERISA pre-empts state law related to retirement plans managed through employers. The significance of this pre-emption is highlighted by cases where the designated beneficiary on an employee's retirement plan is a former spouse. Under Washington law, dissolution of marriage revokes all prior beneficiary designations to the former spouse. RCW 11.07.010. But ERISA has no such rule. If the employee-spouse were to die with

the former spouse as a beneficiary, ERISA requires the plan administrator to follow the designation notwithstanding state law. *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322 (2000) (holding that ERISA's requirement that the plan administrator pay out the policy to the beneficiary designated on the plan documents pre-empts Washington's law that revokes designations of a former spouse).

B. **Life Insurance and Annuities.** Beneficiary designated life insurance policies and annuities are also exempted from the definition of "nonprobate assets." RCW 11.02.005(10). They still pass "outside of probate" if a beneficiary is properly designated, and are therefore technically "nonprobate assets" even if they do not meet the statutory definition of the term. Because life insurance policies and annuities are not defined by statute as a nonprobate asset, the beneficial interest passes free of creditors and free from liability for the expenses of the estate. Therefore, such instruments can be especially effective for families with large amounts of debt. Failing to properly designate a beneficiary might result in the life insurance policy or annuity passing to the estate, and thereby becoming a probate asset, subject to the rights of creditors and estate expenses.

When the named beneficiary is not the surviving spouse, issues of community property can arise. When community funds are used to pay the premiums on a life insurance policy, the community has an interest in the proceeds of the policy. If the life insurance policy is a term policy and the final payment before death was with community funds, the surviving spouse will have an interest in half of the proceeds regardless of the beneficiary designation – also known as the risk payment doctrine. *Aetna Life Ins. Co. v. Wadsworth,* 102 Wn.2d 652, 659, 689 P.2d 46 (1984). On the other hand, if the policy is a cash value policy, the "apportionment rule" applies. Under this rule, "[o]wnership of the proceeds will be separate property or community property in proportion to the percentage of total premiums which have been paid with separate or community funds." *Porter v. Porter,* 107 Wn.2d 43, 49, 726 P.2d 459 (1986).

As with ERISA pre-emption issues involving employee benefit plans, practitioners should be aware of federal pre-emption involving insurance policies of federal employees. As with all estate planning documents, it is important to keep the beneficiary designations current. In *Hillman v. Maretta,* 569 U.S. 483, 133 S. Ct. 1943 (2013), a federal employee failed to remove his ex-spouse from his Federal Employees' Group Life Insurance policy. After he died, the policy was paid to his former spouse. Like the Washington law in *Egelhoff*, *supra,* Virginia had a law that revoked such designations. But Virginia law had an additional "work-around" the federal pre-emption: it allowed the parties who would have otherwise received the policy—had it not been for

federal pre-emption—to sue the party who received the funds. The Supreme Court held that this Virginia law too was pre-empted by federal law.

An annuity is a type of insurance product and can have widely different features depending on what type of annuity a person buys. Generally, however, after an annuity is purchased, the annuity pays the annuitant an amount on a periodic basis, the amount of which can be varied or fixed over the payout period. The annuitant can choose to defer the beginning of the payments until, say, retirement, or begin receiving payments immediately after the purchase. In addition, the sums paid can be for a fixed period of time or only for the life of the annuitant.

Often annuities have an option in which the owner can name a beneficiary who is entitled to receive any amounts that are unpaid at the death of the annuitant. After the insurance company is notified of the death of the annuitant, named beneficiaries will be notified of the options, if any, for continuing the annuity payments. Typically, there are three possibilities for a payout. If there is no beneficiary, or the beneficiary is the estate or a trust, then the full payout must be made within five years following the death of the annuitant. *See* 26 U.S.C. § 72(s). If there is a named, human beneficiary, then that person may choose a lump sum payout or a payout over time, but the payout cannot be longer than the beneficiary's life expectancy. *Id.* The deferred income received by the beneficiary will be considered income of the beneficiary and taxed at his or her tax rate. The deferred income from the annuity does not receive the step-up in basis that most other assets receive after the death of the owner.

VI. Other Devices for Creating Nonprobate Assets

There are several ways that a group of probate assets can be transformed into assets that pass outside of probate. The most common ways of doing this is through a revocable living trust, community property agreements, and superwills, which are all discussed below.

A. <u>Revocable Living Trusts.</u> Revocable living trusts (RLTs) have been traditionally used and marketed as probate-avoidance devices. These trusts are very common in states like California where the probate system tends to be expensive and arduous. On the other hand, in Washington, where the probate process is more manageable, RLTs are not as widely recommended by practitioners.

To use a RLT effectively, clients should ensure that all their presently owned probate assets (real property, bank accounts, vehicles, etc.) are titled in the name of their RLT. Usually, an attorney will assist in the initial titling process to ensure that this is done properly. However, at

times—well after the trust was created by their attorney—clients might acquire property or create a bank account and forget that it also needs to be titled in the name of the trust. Depending on what the asset is, this could undermine the purpose of the RLT and require a probate because of that single wrongly-titled asset. RLTs are usually coupled with pour-over wills that will capture such property. The pour-over will states that all assets that are not in the RLT are transferred to the RLT upon the death of the testator. But to make this transfer, a probate is sometimes needed.

If everything is done properly, however, upon the death of the creator(s) of the RLT, the beneficiaries receive a possessory interest in the property and the assets are transferred by a successor trustee. Practitioners should remember, however, that Washington has trust rules that trustees should follow. *See Washington Trust Act*, Ch. 11.98 RCW.

While typically all of a client's assets that would otherwise pass through a probate would be placed into such a trust, that's not required. For example, such a trust could be created solely for out-of-state property that would be subject to a non-domiciliary probate (i.e., an ancillary probate). This is an important consideration when a client is domiciled in Washington, yet owns property located in a state like California. A much simpler solution for clients with out-of-state real property would be the use of a beneficiary deed (a.k.a., a transfer on death deed), if the state where the client's property is located has such a law.

B. Community Property Agreements. Community property agreements are often entered into by spouses in order to avoid the inconvenience of probate on the death of the first spouse. Such agreements typically declare all presently-owned and future-acquired property as community property. More importantly, however, they also declare that upon the passing of one spouse, all the community property will pass to the surviving spouse (the "third prong" of the classic community property agreement).

Upon the death of the first spouse, this instrument can be used to access and obtain the deceased spouse's assets, including funds in a decedent's bank account and transfer and obtain securities. To clear the title of real property from the name of the two spouses to the one surviving spouse, the agreement needs to be filed with the county recorder's office, along with a death certificate and an affidavit affirming several facts, including that the agreement is still in effect. Banks and transfer agents will sometimes also require a certified copy of the recorded community property agreement and affidavit. *See* RCW 30A.22.190(1) & RCW 11.02.120.

Community property agreements are powerful tools. Practitioners should be careful to explain to clients that this simple document converts all presently-owned and future-acquired property into community property. Often clients do not understand the difference between separate and community property, and assume that because they live in Washington all property is community property. On the other hand, some clients might understand the difference, and have purposefully kept property separate and might not realize that a community property agreement will change this.

Clients should also understand that community property agreements override contrary designations in a will, joint tenancy designations, and other designations. *See Estate of Lyman,* 7 Wn. App. 945, 503 P.2d 1127 (1972), *affirmed by* 82 Wn.2d 693 (1973). In *Lyon v. Lyon,* 100 Wn.2d 409, 670 P.2d 272 (1983), two brothers inherited land from their father, which was titled as joint with right of survivorship. One brother later executed a community property agreement with his wife. When that brother passed away, his wife became a tenant in common in the property with the surviving brother and the joint tenancy was severed.

C. **<u>Superwills.</u>** Washington has a unique law that permits a person to create a will that overrides certain nonprobate designations that were made prior to execution of the will. This is commonly referred to as the "superwill statute." Ch. 11.11 RCW (formally called the Testamentary Disposition of Nonprobate Assets Act).

The superwill statute does not cover all nonprobate assets. It covers nonprobate assets described in RCW 11.02.005, but specifically excludes (1) real property passing under a joint tenancy with right of survivorship, (2) a deed or conveyance for which possession has been postponed until the death of the owner, (3) a transfer on death deed, (4) an interest passing under a community property agreement, and (5) an individual retirement account or bond. RCW 11.11.010(7).

Drafting language in a will that is intended to override nonprobate asset designations should be done with care. Under the law, the following language would be satisfactory to pass nonprobate assets to the beneficiaries in the will: "all nonprobate assets," "all of my payable on death bank accounts," or similar language. RCW 11.11.020(3).

If the owner of an account later changes the beneficiary designation on the account, that subsequent designation will control the disposition of the asset, not the superwill provision. If the

owner later revokes the subsequent designation and there is no designation to control how the asset is to be distributed, it will be distributed pursuant to the general terms of the owner's will.

While this seems straightforward, it is easy to create ambiguities that lead to litigation without a thorough knowledge of a client's assets. In *Estate of Burks v. Kidd,* 124 Wn. App. 327, 100 P.3d 328 (2004), a decedent had created two pay on death bank accounts, but later drafted a will with the following language: "I have certain bank accounts and savings accounts and may in the future have other evidences of property which are or may be in the joint name of myself and one of my children. Such designation is for business convenience only and is not intended as a gift to such child." The residuary beneficiaries of the will claimed that this language changed the nonprobate status of the POD accounts. The court disagreed, reasoning that the language in the will did not specifically refer to the POD accounts, nor did it identify an entire category of nonprobate assets. The POD accounts remained nonprobate assets and were not controlled by the superwill provision.

It is not recommended that superwill provisions be used as a regular estate planning tool. The biggest disadvantage of using a superwill provision involves the possibility of litigation and disputes. When banks or other financial institutions learn of the death of an account holder, they will typically pay out funds to the named beneficiary with only a death certificate. By the time the personal representative contacts the bank, the funds may be gone. If the funds aren't gone, litigation still might ensue over whether the beneficiary designation or the superwill controls the disposition of the account.

Superwill provisions are sometimes used when clients are leaving on a trip and do not have time to change beneficiary designations. In these cases, it's wise to advise clients to correct the beneficiary designations when they return.

VII. Other Issues

A. <u>Abatement and Nonprobate Assets.</u> As discussed above, most nonprobate assets are subject to the claims of the decedent's creditors and the expenses of the estate. Abatement is the way in which an estate's assets are expended to pay these debts. Under Washington's abatement statute, absent different instructions in a person's will, the decedent's intestate estate will be used first to pay any debts. Next, the assets in the decedent's residuary estate will be used. If the residuary estate is insufficient, the debts must be paid from any general gifts. If general gifts are also insufficient, the debts must be paid from specific bequests.

Nonprobate assets are considered specific bequests under the abatement statute. RCW 11.10.040(2)(a); *see also* RCW 11.18.200. Typically, therefore, nonprobate assets will be protected, unless the estate is heavily indebted, or the estate is primarily comprised of nonprobate assets. The proceeds from life insurance policies, employee benefit plans and annuities, however, are exempted from the abatement statute. Therefore, heirs take these assets free of creditors and the expenses of the estate. RCW 48.18.410; RCW 6.15.020 & RCW 11.18.200(h) & (*i*).

B. **Taxes.** The creation of nonprobate assets is not an effective way to avoid estate taxes. Nonprobate assets, including life insurance, are includable in a decedent's estate if owned at the time of death.

C. **Final Caveat.** These materials are not intended to leave the impression that avoiding probate should be the primary goal of any estate plan. Fortunately, Washington has a relatively efficient probate system that provides a helpful court-approved structure through which heirs and fiduciaries are protected from future creditor claims or allegations of improper distributions. The author has created a website that discusses the probate process in King County, which can be accessed at www.kingcountyprobates.com.

APPENDIX A

WHEN RECORDED RETURN TO:

XXXXXXXXXXXXX
XXXXXXXXXXXXX
XXXXXXXXXXXXX
XXXXXXXXXXXXX

Document: Revocable Transfer on Death Deed
Grantor: XXXXXXXXXXXXX
Grantee (Designated Beneficiary): XXXXXXXXXXXXXX
Abbreviated Legal Description: XXXXXXXXXXXXXXXXXXXX
Tax ID No.: XXXXXXXXXXXX

REVOCABLE TRANSFER ON DEATH DEED

GRANTOR, XXXXXXXXXXXX, a [single or married] person, who acquired title on or around XXXXXXXXXXX, 20XX, for love and affection and for no other consideration, transfers all of Grantor's interest in the below-described property, including without limitation any after acquired title of Grantor, to XXXXXXXXXXXXX (Designated Beneficiary), a [single or married] person as [his/her] separate property, upon the Grantor's death and only if the Designated Beneficiary survives the Grantor. The Property that is the subject of this deed is legally described as:

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX;

SUBJECT TO all reservations, restrictions, covenants, and conditions of record.

Tax Parcel No.: XXXXXXXXXXXXXX

This deed is a Transfer on Death Deed executed pursuant to the provisions of the Washington Uniform Real Property Transfer on Death Act. Before the death of Grantor, the Grantor has the absolute right to revoke this deed. The transfer to Designated Beneficiary is to occur at Grantor's death and is contingent on Designated Beneficiary surviving Grantor. The recording of this deed is not a "sale" pursuant to RCW 82.45.010(1). Grantor understands that the transfer that will occur under this deed is exempt from the Washington Real Estate Excise Tax by reason of RCW 82.45.101(3)(b) and WAC 458-61A-202(7).

DATED this _______ day of ______________________20__.

GRANTOR

____

STATE OF WASHINGTON

COUNTY OF KING

On this day personally appeared before me XXXXXXXXXXXXXXXX, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that she signed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed on _________________________, 20__

____
Print Name: ______________________________
Notary Public for the State of Washington
Residing at: _____________________________
My commission expires: ___________________

REAL PROPERTY

FINANCIAL ACCOUNTS

CHAD HORNER
Curran Law Firm
kingcountyprobates.com

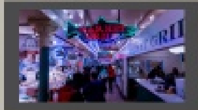
INTRODUCTION

SPECIAL ASSETS

ESTATE PLANNING

Outside the Will

NONPROBATE DEVICES



Isn't a will enough?

Revocable Living Trusts

Life Insurance & Annuities

PODs and TODs

401ks & IRAs

Transfer on Death Deeds

Community Property Agreements

JWROS

Jointly Held Real Property

Nonprobate Assets

- Assets that pass through a written instrument other than a person's will
- Examples in RCW 11.02.005(10)
- Note important exemptions from definition: life insurance policies, annuities and employee benefits plans

RCW 11.02.005(10)

(10) "Nonprobate asset" means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under a written instrument or arrangement other than the person's will. "Nonprobate asset" includes, but is not limited to, a right or interest passing under a joint tenancy with right of survivorship, joint bank account with right of survivorship, transfer on death deed, payable on death or trust bank account, transfer on death security or security account, deed or conveyance if possession has been postponed until the death of the person, trust of which the person is grantor and that becomes effective or irrevocable only upon the person's death, community property agreement, individual retirement account or bond, or note or other contract the payment or performance of which is affected by the death of the person. "Nonprobate asset" does not include: A payable-on-death provision of a life insurance policy, annuity, or other similar contract, or of an employee benefit plan; a right or interest passing by descent and distribution under chapter **11.04** RCW; a right or interest if, before death, the person has irrevocably transferred the right or interest, the person has waived the power to transfer it or, in the case of contractual arrangement, the person has waived the unilateral right to rescind or modify the arrangement; or a right or interest held by the person solely in a fiduciary capacity. For the definition of "nonprobate asset" relating to revocation of a provision for a former spouse upon dissolution of marriage or declaration of invalidity of marriage, RCW **11.07.010**(5) applies. For the definition of "nonprobate asset" relating to testamentary disposition of nonprobate assets, see RCW **11.11.010**(7).

REAL PROPERTY

Joint Tenancy with Right of Survivorship

Joint owners own an equal undivided interest in the property and upon death, interest passes to survivor(s)

- Not Unilaterally Revocable
- Creditor Issues
- Gifting/Tax Basis Issue
- Community Property Agreement?

Revocable Transfer on Death Deed

Transfer on Death Deed: Owner names beneficiar(ies); upon death, interest vests in surviving beneficiaries. Chapter 68.40 RCW.

- Revocable Prior to Death
- No Present Interest Passes
- Full Step-up at Death

FINANCIAL ACCOUNTS

Joint Accounts with Right of Survivorship

Joint owners own an interest in proportion to their contribution...until death. Before death, all owners free to manage funds.

- What was intent of primary depositor?
- Creditor Issues?
- Could instead use well-drafted POA

Pay/Transfer on Death Financial Accounts

POD/TOD designations on bank and brokerage accounts: Vests in designee at death of account owner

- Fewer disputes over intent
- Beneficiary has no control over account; but can use POA

POD/TOD Designations

Consistent with overall estate plan?

SPECIAL ASSETS
Retirement Plans, Life Insurance Policies & Annuities

Employee Benefits Plans

401Ks, 403Bs, 457s, IRAs, etc.: Pass to beneficiaries free of creditors and estate expenses

- Make sure designations are made and up to date
- Be very cautious before naming estate as beneficiary

Life Insurance and Annuities

Life insurance policies and annuities: Pass to beneficiaries free of creditors and estate expenses

- Make sure designations are made and up to date
- Be cautious before naming estate as beneficiary on annuity

NONPROBATE DEVICES

Revocable Living Trusts

What: A trust, in which all of the trustor's probate assets are titled and held

Why: To avoid probate (some confidentiality)

- To achieve purpose, all probate assets must be placed into trust
- Still must provide proper notices, manage creditors, etc.

Community Property Agreements

What: Agreement that converts all present and future property into CP and vests all CP in surviving spouse at death of first spouse

Why: Avoid probate upon first spouse's death

- Consistent with will?
- Consistent with other designations?
- Clients need education on subject

FINAL COMMENTS

ABATEMENT

Other than "special assets," all assets are subject to creditors & expenses of estate. RCW 11.18.200.

ESTATE TAXES

All assets are used in determining estate tax exposure, including life insurance

Thanks for Listening